

## **Request for Initiating the Clean Water Act 404 (c) Process in the Headwaters of Bristol Bay's Kvichak and Nushagak River Drainages.**

The Bristol Bay area of Alaska is, in the words of Interior Secretary Ken Salazar, “a national treasure that we must protect” and “too special” to drill for oil.<sup>1</sup> For these reasons, President Obama earlier this year withdrew the federal offshore waters of the region from oil and gas leasing.

While the offshore has been protected, the proposed Pebble mine and its associated facilities pose similarly unacceptable risks to the resources and people of Bristol Bay. Consequently, a broad-based coalition of Alaska Natives, commercial fishermen, sportsmen and others respectfully request that EPA start the Clean Water Act 404(c) process to protect the headwaters of the Kvichak and Nushagak River drainages of the Bristol Bay watershed.

Initiating the CWA 404 (c) now will start a public dialogue on the need for protections at this point, as well as allow precise identification of specific wetlands and waters that should be subject to a prohibition on or restriction of dredge and fill activity. Starting now will also fulfill congressional intent that such large threats be dealt with proactively by the EPA for the benefit of all, thereby saving government, industry, and local communities millions of dollars and precious working resources, and help fulfill EPA's trust responsibility to tribes. Most fundamentally, by acting now, EPA will save this “national treasure” and protect this beautiful land and its invaluable resources for generations to come.

### **Proactive Use of Clean Water Act Section 404(c)**

The objective of the Clean Water Act is to “... maintain the chemical, physical, and biological integrity of the Nation's waters.” Section 404(c) was created with the authority to allow the Administrator to “prohibit” (as well as withdraw, deny or restrict) the discharge of dredged or fill materials into waters of the United States if such discharge “will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”<sup>2</sup> EPA may “prohibit [such discharges]....before a permit application has been submitted to the Corps.”<sup>3</sup>

As EPA has explained, proactive use of 404(c) “facilitate[s] planning by developers and industry ... eliminat[ing] frustrating situations in which someone spends time and money developing a project for an inappropriate site and learns at an advanced stage he must start over. ... In addition, advance prohibition will facilitate comprehensive

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<sup>1</sup> Bluemink, Elizabeth, *Obama drilling policy excludes Bristol Bay*. Available at: <http://www.adn.com/2010/03/31/1206793/bristol-bay-off-limits-arctic.html#ixzz0owo423Mo>.

<sup>2</sup> An “unacceptable adverse effect” means an impact which is likely to result in significant degradation of a listed resource (40 C.F.R. Part 230).

<sup>3</sup> 40CFR 231.1(a) EPA used §404(c) in Bayou Aux Carps when no application was pending.

rather than piecemeal protection of wetlands. ... [T]here are instances where a site may be so sensitive and valuable that it is possible to say that any filling of more than X acres will have unacceptable adverse affects. EPA recognizes that *where possible it is much more preferable to exercise this [§404(c)] authority before the Corps or state has issued a permit...*<sup>4</sup>

**The Proposed Pebble Mine and Its Associated Facilities Pose Unacceptable Risks to the Resources and People of Bristol Bay.**

The proponents of the Pebble Mine estimate that it would produce between 2.5 and 9 billion tons of waste<sup>5</sup> containing elements, such as copper and other heavy metals. This waste threatens municipal water supplies, several fishery areas (including spawning and breeding grounds for world renowned populations of salmon), wildlife health and recreation areas.<sup>6</sup>

If this project moves forward, these toxins would have to be contained and potentially treated in perpetuity. Because the Pebble mining claims straddles the Kvichak and Nushagak river drainages, which in turn are the foundation for Bristol Bay salmon fisheries, any release of mining waste into the surface or groundwater, has the potential to severely harm Bristol Bay's salmon. The threat is real, therefore, for the Alaska Natives, commercial fishermen, sport fishing business owners and many others who depend on a healthy Bristol Bay for their economic support, subsistence hunting and fishing, and cultural well-being.

The proposed Pebble Mine and associated facilities risk triggering adverse effects to several 404(c) resources of concern, including, but not limited to:

*Fishery Areas (including spawning and breeding grounds):* Bristol Bay is widely recognized as one of the last remaining strongholds for healthy salmon populations in North America and the world. The region provides pristine spawning grounds for trophy rainbow trout and all five species of Pacific salmon, including the largest sockeye salmon runs on Earth, and a variety of other fish and wildlife species that depend on the nutrients from salmon, clean water, and undisturbed habitat. Native Alaskan communities rely on these area resources today, as they have for centuries, to support traditional subsistence ways of life, and Bristol Bay's salmon runs are the economic engine for the entire region. Jobs linked to the commercial fisheries account for 75 percent of the local employment and generate nearly \$325 million annually. Bristol Bay salmon account for 40% of global sockeye consumption; providing a healthy and nutritious form of protein for millions of people.

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<sup>4</sup> 44 Fed. Reg. 58076, 58077 (Oct. 9, 1979). Further, proactive use of 404(c) authority, exercised through a rigorous process, presents no more threat of illegal taking of private property rights than would the denial of a 404 permit for a proposed mine.

<sup>5</sup> Northern Dynasty Minerals, Ltd. News Release, Pebble Budget Increased To US \$70 Million For 2009 (Sept. 23 2009) at 2.

<sup>6</sup> Robert E. Moran, Ph.D., Michael-Moran Assoc., LLC, Pebble Mine: Hydrogeology and Geochemistry Issues (Sept. 2007), available at [http://www.fish4thefuture.com/pdfs/Moran\\_Hydrogeology\\_Geochemistry\\_8\\_9\\_07.pdf](http://www.fish4thefuture.com/pdfs/Moran_Hydrogeology_Geochemistry_8_9_07.pdf) at 6, 11, 21, 25.

These fisheries and the complex ecosystems relying on salmon have proven to be entirely self-sustaining because of the intrinsic qualities of the habitat, and the fact that the habitat has not been degraded.

*Wildlife Areas:* The uplands of Bristol Bay are important habitat for caribou and moose, both of which are important to subsistence and sport hunters. Caribou calving grounds and moose winter habitat are on lands at or proximate to the mining claims or its associated facilities.

*Recreation Areas:* Sport anglers looking for “once in a lifetime” experiences on rivers such as the Nushagak, Mulchatna, Koktuli and Kvichak support more than 800 full- and part-time jobs, with sport fishing generating more than \$60 million annually for the region.<sup>7</sup>

*Municipal Water Supplies:* Drinking water in the region comes from local rivers and waterways. Large-scale mining activities such as the potential Pebble Mine will likely impact drinking water through leaching heavy metals and other contaminants from waste rock, tailings, and waste containment facilities.<sup>8</sup>

PLP mining claims cover roughly 180 square miles and plans for a mining and processing complex covering roughly 30 square miles.<sup>9</sup> Thus, in addition to the numerous threats of direct and long-term impacts from depositing up to nine billion tons of mine waste in the headwaters of Bristol Bay, the indirect impacts of the proposed Pebble mine could be equally substantial.

### **Proactive Action is Supported by EPA’s Trust Responsibility to Indian Tribes**

In its proposed policy for relations with Indian Tribes, EPA states that it should “consult on a government-to-government basis with tribal governments when EPA actions and decisions may affect tribal interests.”<sup>10</sup> Furthermore, it provides that EPA should work to ensure “the close involvement of tribal governments and gives special consideration to their interests whenever EPA’s actions may affect Indian country or other tribal interests. [and] [w]hen EPA issues involve other federal agencies, EPA carries out its consultation responsibilities jointly with those other agencies, where appropriate.”

<sup>7</sup> John Duffield et al., *Economics of Wild Salmon Watersheds; Bristol Bay, Alaska*. 2007.

<sup>8</sup> See US EPA “Fact Sheet: Final Third Drinking Water Contaminant Candidate List (CCL 3)” issued September 2009 available at [http://www.epa.gov/ogwdw000/ccl/pdfs/ccl3\\_docs/fs\\_cc3\\_final.pdf](http://www.epa.gov/ogwdw000/ccl/pdfs/ccl3_docs/fs_cc3_final.pdf) (including, among other metals, molybdenum, which is proposed to be mined from the Pebble claims).

<sup>9</sup> See Northern Dynasty Mines Inc., Pebble Project Application for Water Right, North Fork Koktuli River (July 7, 2006), available at <http://dnr.alaska.gov/mlw/mining/largemine/pebble/2006/swnforkorig.pdf> at Exhibit A, pp. 1-33; see also Knight Piesbold Consulting, Northern Dynasty Mines, Inc., Tailings Impoundment A Initial Application Report (Sept. 5, 2006) Figures, available at <http://dnr.alaska.gov/mlw/mining/largemine/pebble/2006/damafig.pdf> at Figure 3.1.

<sup>10</sup> EPA Policy on Consultation and Coordination with Indian Tribes, dated June 9, 2010

Six federally recognized tribes in the Kvichak and Nushagak River drainages of Southwest Alaska (Nondalton Tribal Council, Koliganik Village Council, New Stuyahok Traditional Council, Ekwok Village Council, Curyung Tribal Council and Levelock Village Council) have requested that EPA proactively use its 404(c) authority to protect Bristol Bay. Therefore, federally recognized tribes have identified specific unacceptable and adverse impacts from a potential Pebble Mine that would directly affect tribal interests. Consequently, early EPA action is warranted, even in advance of a permit application, and would fulfill EPA's Trust Obligation as well as Congressional Intent with regard to CWA Section 404 (c).

### **EPA Should Initiate the 404(c) Process**

Previous experience demonstrates the business community's desire for certainty. In regards to the Spruce determination<sup>11</sup>, a significant complaint was that EPA waited too long to use its' authority and that EPA's attempt to withdraw the lands created uncertainty for business and should have been done earlier. A potential Pebble Mine and associated facilities pose unacceptable and adverse effects to Bristol Bay resources. Acting now, EPA can save the United States Government from expending valuable monetary and people resources. Further, EPA's immediate action benefits all stakeholders as it sends a clear message about the types of projects that are not appropriate for this area.

In addition to promoting efficient and timely use of resources, EPA's immediate action would address local societal stressors associated with the fear and uncertainty of the local inhabitants. A previous attempt by PLP to engage the community with a "technical working group" collapsed when PLP was unwilling to share data between the company, state and federal regulators - the company was unwilling to share raw data which caused great frustration for EPA and others and resulted in the cancellation of the group. The community felt it was left out of any significant role related to future use of the lands. EPA, by initiating the 404(c) process, would begin anew a public dialogue with the local community to define appropriate uses of the Bristol Bay area. Only EPA can be the "Convenor of Stature" with the local community and ensure a public dialogue. Now is the time to act to protect this area as it is intact and functioning, providing irreplaceable resources fueling the local economy.

In sum, EPA has the duty, legal authority and moral imperative to immediately initiate the CWA §404(c) process in regard to the area of Bristol Bay, Alaska effected by the proposed Pebble Mine project.

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<sup>11</sup> See EPA, Spruce No. 1 Mine 404(c) Questions & Answers for Web Posting, Oct. 16, 2009, [http://www.epa.gov/owow/wetlands/pdf/spruce\\_1\\_Oct\\_16\\_2009\\_q\\_and\\_a.pdf](http://www.epa.gov/owow/wetlands/pdf/spruce_1_Oct_16_2009_q_and_a.pdf)